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In the Supreme Court of the United States

OCTOBER TERM 1942

No. 284

H. T. OVERSTREET, R. BRAZLE and L. L. GARVIN,
Petitioners,

vs.

THE NORTH SHORE CORPORATION, a corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Reference to Official Reports of the Opinions Delivered in the Courts Below.

The case now at the Bar of this Court has been reported as follows:

In the District Court at 43 F. Supp. 445 and 4 Labor Cases, par. 60,736.

In the Circuit Court of Appeals at 128 Fed. (2d) 450 and 5 Labor Cases, par. 61,079.

II. Statement of Grounds of Opposition to Issuance of Writ.

The writ in the case at bar is applied for upon two grounds:

(1) That the Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by this Court.

(2) That the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

We are of the opinion that the authorities hereinafter cited in Argument disclose that the point herein involved has been settled by at least three decisions of this Court, namely:

Lake Superior R. R. Co. v. United States, infra;

Henderson Bridge Co. v. Kentucky, infra;

Detroit International Bridge Co. v. Corporation Tax Appeal Board of the State of Michigan, infra.

If we are correct in this, the grounds asserted in support of the petition for the writ of certiorari are, obviously, not well taken.

And let us consider a part of the first point attempted to be made by counsel for petitioners: That the case involves an important question of Federal Law. In spite of the fact that toll roads and toll bridges belong to the horse and buggy days and that very few now exist in the United States, counsel asserts that this court will take judicial notice that thousands of persons would be affected by the decision in this case.

Counsel makes that point with reference to a privately owned toll road, lying wholly within the borders of Duval County, Florida, which County does not even border upon a neighboring State, and in the case of a road which comes to a dead end on an island (the population of which, in 1940, was 98—as this Court may take judicial notice) near the Atlantic Coast, there being no factories nor any industrial activity along same. The road involved serves only pleasure

resorts and residences. It is not alleged to be and is not a through road and, as appears from the complaint, no substantial amount of what the complaint alleges to be "commerce" goes over the road.

The case as presented involves solely the claim of three men to additional compensation under the Fair Labor Standards Act, as made against a small concern. If it be true, as counsel would have it appear, that the case involves important points, which we do not concede, it would be much more appropriate for this court to decide the points involved in a case involving a through highway or a railroad handling interstate commerce, rather than to take the matter up in a case involving such a purely local enterprise as the complaint exhibits this case to involve.

If a vehicle is to be sought for the expression of this court's views with regard to the phrase "engaged in commerce" as contained in the Fair Labor Standards Act, it is submitted that it would be much to be preferred that such case be in a field in which this court has not already defined commerce by excluding the particular type of business involved.

We also point out that there are no conflicting Circuit Court of Appeals opinions. True, counsel for petitioners do not rely on a conflict in Circuit Court of Appeals opinions in requesting issuance of this writ, but we fail to see, in the light of the foregoing cited decisions of this court, how Circuit Courts of Appeal could disagree on the narrow question here involved.

III. Statement of the Case.

This matter was presented below upon the statement by the Petitioners of their case in their Complaint. The sufficiency of the Complaint, insofar as it stated the case of the Petitioners, was attacked by Motion to Dismiss, and both

the District Court and Circuit Court of Appeals held that the Complaint was insufficient to state a case in favor of the Petitioners under the Fair Labor Standards Act.

The case attempted to be made by the Complaint (R. 2-4) is this:—

The Respondent, The North Shore Corporation, is alleged to be the owner and operator of a toll road (known at common law as a turnpike) connecting with U. S. Highway No. 17, North of Jacksonville, and running to Fort George Island. Those two points are wholly within Duval County, Florida. The allegations of the complaint set up that the toll road connects with U. S. Highway No. 17 and crosses Sister's Creek (the intercoastal waterway) on a drawbridge, also owned, controlled and operated by the North Shore Corporation. It alleges: that the toll road is the only means of land communication between Fort George Island and the rest of the United States; that the road is extensively used by vehicular traffic from points outside of Florida to points on the toll road and beyond and by vehicular traffic from points on the toll road and beyond to points outside the State of Florida, for hire, that is to say, for a toll or fee; that the road is an integral part of the highway system of the United States; that on Fort George Island there are located two large clubs whose memberships mostly consist of people from States other than the State of Florida, who use the road in interstate commerce for hire; that there is a large winter colony on Fort George Island whose residents come from States other than Florida, who use the toll road in interstate commerce for hire; that on the road, accessible by land only over the road, are located several fishing camps renting boats, cabins and serving meals, which camps are frequented by the public and used extensively by visitors from Georgia, South Carolina and other nearby States, who use the road in interstate commerce for hire; that mail and parcels from other states are delivered to

residents and visitors along said road; that the U. S. Post Office Department uses the road for mail delivery; that the intercoastal waterway is constantly used in interstate commerce by pleasure craft and freight vessels, the draw-bridge being constantly raised and lowered to permit the passage of such boats, which are engaged in interstate commerce; that supplies are delivered to such boats at the draw-bridge over Sister's Creek by use of the road; that passengers are picked up and discharged at the same place and use the road; that on the road are several retail stores and stands purchasing commodities, for re-sale to the public, which commodities have moved in interstate commerce, are delivered to them over the road, and move over the road in their original packages; that the road is the shortest route to both Eastport and New Berlin and is used, for a toll or fee, for the delivery of similar goods to those communities.

The complaint, in paragraph 4 (R-5), alleges that the Petitioner, Overstreet, was employed by The North Shore Corporation as the operator of the drawbridge on the toll road; that the drawbridge crosses Sister's Creek, a part of the intercoastal canal and interstate waterway between New York and Miami; that it was Overstreet's duty to raise and lower said bridge to allow boats to pass under said bridge, many of the boats being operated in interstate commerce daily.

The complaint as amended (R. 16) alleges that the Petitioner, R. Brazle, was an employee of The North Shore Corporation engaged in the business of maintaining and repairing the toll road and bridges, which were integral parts of the toll road, whose services were necessary to the maintenance and use of the toll road in interstate commerce.

The complaint as amended (R. 16) alleges that the Petitioner, Garvin, was an employee of The North Shore Corporation engaged in selling toll tickets and collecting them from vehicles using the road in interstate commerce.

There are other allegations, the sufficiency of which is not material at present, to the effect that Petitioners were not paid the minimum wages prescribed by the Fair Labor Standards Act. The demand is for those wages, together with an equal sum as liquidated damages, and attorneys' fees.

Both the District Court and Circuit Court of Appeals have held that the facts alleged did not show that Petitioners were entitled to the benefits of the Fair Labor Standards Act for the reason that it is not made to appear that Petitioners were "engaged in commerce" within the meaning of that act. Petitioners have never attempted to claim, and do not now claim (B. 13), that they were "engaged in the production of goods for commerce."

IV. Argument.

Summarized, the argument of the respondent is as follows: This case involves purely a matter of statutory construction. While the business of the respondent and the duties of its several employees, including petitioners, may remotely affect interstate commerce, that fact does not bring about coverage under the Fair Labor Standards Act. Since no question of "production of goods for commerce" is involved, the inquiry resolves itself solely into one as to whether or not the employees of respondent are "engaged in commerce", within the meaning of the Fair Labor Standards Act. The phrase, "engaged in commerce", meaning "engaged in interstate commerce", and the words definitive thereof, "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof", having been frequently construed by this court, the rule to be applied is that, in ascertaining the legislative intent, words and phrases, the meaning of which have been ascertained by judicial interpreta-

tion, when used in a subsequent statute, are to be understood in the same sense. The decisions of this and other courts having defined businesses, such as that exhibited by the complaint below, as not in interstate "commerce", "transportation" or "transmission", it follows that Congress may not be deemed to have included persons engaged therein as being within the scope of those words. Petitioners, therefore, are properly held not entitled to the benefits of the act.

This argument, we present under the following points:

1. The questions presented involve solely the matter of the proper construction of the Fair Labor Standards Act.

2. This case presents no question whether the Petitioners were "engaged in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

3. The fact that the Employee's duties may affect interstate commerce does not bring about coverage under the clause "engaged in commerce" in the Fair Labor Standards Act.

4. The only questions presented involve the determination whether Petitioners, or any of them, were "engaged in commerce" within the meaning of the Fair Labor Standards Act.

5. This court's decisions differentiate between a road, highway, bridge or railroad as a facility or a thoroughfare on the one hand, and the transportation operations carried on upon them on the other hand.

6. The phrases, interstate "commerce", "transportation" and "transmission", have been defined by this court and other courts, as excluding a commercial enterprise of the character of that operated by respondent and its employees.

7. The phrases, interstate "commerce", "transportation", and "transmission", having been defined judicially to exclude a commercial enterprise of the character of that operated by respondent and its employees, those phrases, used subsequently, in the Fair Labor Standards Act, are to be understood in the same sense, and the act is to be understood as excluding such an enterprise.

8. Discussion of the Authorities relied on by Petitioner.

9. Conclusion.

We shall now proceed to discuss these points:

1. The Questions Presented Involve Solely the Matter of the Proper Construction of the Fair Labor Standards Act.

The power of the Congress under the Commerce Clause has been frequently discussed and enunciated by this court. That the power extends to businesses, the operation of which merely "affects" commerce, is well settled.[1] That the Fair Labor Standards Act is constitutional is settled.[2] Its application, under the Fair Labor Standards Act, to employees in businesses, the operation of which merely affects Commerce, under the phrase "engaged in the production of goods for commerce", defined in the Act as including "any process or occupation necessary to the production", has been determined.[3] None of the foregoing matters is here involved. This case involves solely the meaning and scope of the phrase "engaged in commerce", as contained in the Fair Labor Standards Act. The Act,

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[1] *Santa Cruz Fruit Packing Co. v. National Labor Relations Board*, 303 U. S. 453, 82 L. Ed. 954.

[2] *United States v. Darby*, 312 U. S. 100, 85 L. Ed. 609.

[3] *Kirschbaum v. Walling; Arsenal Building Corporation v. Walling*, . . . U. S. . . ., 86 L. Ed. 1054.

in Section 6, prescribes the payment by an employer of certain minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce", and, in Section 7, payment of overtime compensation to "any of his employees, who is engaged in commerce or in the production of goods for commerce". Section 3(b) defines "commerce" as "trade, commerce, transportation, transmission or communication among the several states or from any state to any place outside thereof".

> "The Act, except in the matter of 'production of goods for commerce,' contains no provision making 'any process or occupation necessary to the production' of goods applicable to interstate commerce as distinguished from production of goods for commerce."
>
> *Cliett v. Miami Crystal Ice & Cold Storage Co.*, . . . F. Supp. . . . ., 6 Labor Cases, par. 61,209.

2. This Case Presents no Question Whether the Petitioners Were "Engaged in the Production of Goods for Commerce" Within the Meaning of the Fair Labor Standards Act.

On page 13 of Petitioner's Brief it is said:—

> "Petitioners do not contend that they are 'engaged . . . in the production of goods for commerce', and so the whole question turns on whether they are 'engaged in commerce'."

The record bears out this statement.

3. The Fact that the Employee's Duties May Affect Interstate Commerce Does Not Bring About Coverage Under the Clause "Engaged in Commerce" in the Fair Labor Standards Act.

In the *Kirschbaum* case, it was pointed out, in this court's opinion, that Congress has deliberately refrained

from occupying, in the Fair Labor Standards Act, the whole field to which its power extended. In that connection, it was said, among other things:

> "Congress may choose, as it has chosen frequently in the past, to regulate only part of what it constitutionally can regulate, leaving to the States activities which, if isolated, are only local."
>
> "The history of Congressional legislation regulating * * * interstate commerce * * * justifies the generalization that, when the federal government takes over * * * local radiations in the vast network of our national economic enterprise * * * those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation."
>
> "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce'. See H. Rep. No. 2182, 75th Cong., 3rd Sess., p. 2; 83 Cong. Rec. 7749-50. But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'. H. Rep. No. 2738, 75th Cong., 3rd Sess., pp. 29-30; 83 Cong. Rec. 9158, 9266-67."

Here, as in that case, the question arises:—

> "Since the scope of the Act is not coextensive with the limits of the power of Congress over commerce, the question remains whether these employees fall within the statutory definition of employees 'engaged in commerce or in the production of goods for commerce', construed as the provision must be in the context of the history of federal absorption of governmental authority over industrial enterprise. * * * the Fair Labor Standards Act puts upon the courts the independent responsibility of applying ad hoc the

general terms of the statute to an infinite variety of complicated industrial situations."

As the Circuit Court of Appeals for the Fifth Circuit has put it:

> "In the case of Jax Beer Company v. Redfern, etc., 124 F. 2d 172, decided today, we had occasion to point out that the critical words of Sections 6(a) and 7(a) of the Fair Labor Standards Act are 'engaged in commerce or in the production of goods for commerce,' and that the application of the minimum wage and maximum hours provisions of these sections is dependent upon the nature of the work performed by the particular employee, and not upon the fact that the business of the employer may in some manner 'affect commerce'."
>
> *Swift & Co. v. Wilkerson*, 124 F. 2d 176.

> "As to what is and what is not interstate commerce the appellees and the Administrator of the Wage and Hour Divison, in his brief as amicus curiae, lay stress upon the language contained in many decisions under the National Labor Relations Act, 29 U. S. C. A. Sec. 151 et seq. These cases are not altogether applicable for, as pointed out by the Supreme Court, the 'critical words' of the National Labor Relations Act are 'affecting commerce'. Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 467, 58 S. Ct. 656, 82 L. Ed. 954."
>
> *Jax Beer Co. v. Redfern*, 124 F. 2d 172, 174.

Counsel for Petitioners contend for a liberal construction of the law. We meet this contention with the assertion that what is to be sought is a fair interpretation of the language used by Congress in the law. Congress could have extended the law to the operations of all businesses which "affected" commerce, including any process or occupation necessary thereto, as in the case of "production of goods

for commerce". That Congress specifically extended the one phrase (production for commerce) and not the other (commerce) would seem especially significant. The maxim "*expressio unius est exclusio alterius*" seems applicable.

4. The Only Questions Presented Involve the Determination Whether Petitioners, or Any of Them, Were "Engaged in Commerce" Within the Meaning of the Fair Labor Standards Act.

The discussion thus far brings us clearly to the conclusion here expressed. That Petitioners agree is borne out by their affirmative assertion, the leading point in their Brief (B.12):

> "(1) The Complainant Shows Petitioners are 'Engaged in Commerce' and so are Within the Coverage of the Fair Labor Standards Act."

5. This Court's Decisions Differentiate Between a Road, Highway, Bridge or Railroad as a Facility or a Thoroughfare on the one Hand, and the Transportation Operations Carried on Upon Them on the Other Hand.

To establish this point we quote from *Lake Superior R. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965, 970.

> "We know, as well as we know the sense of any phrase in the English language which has a historical meaning and application, what is meant when a railroad is spoken of in a law as a '*public highway*'. We know that it *refers to the immovable structure stretching across the country*, graded and railed for the use of the locomotive and its train of cars.
>
> "But it is not alone in charters which contemplate the creation of railroads as public highways that we find evidence of the understood *distinction between railroads as mere throughfares, and the operations to*

be carried on upon them by means of locomotives and cars. This is manifest from the fact, amongst other things, that express power is invariably given (if intended to be conferred) to the railroad company to equip its road, and to transport goods and passengers thereon, and charge compensation therefor. This practice evidently springs from the conviction that a *railroad company is not necessarily a transportation company,* and that, *to make it such, express authority must be given for that purpose,* in compliance with the rule that no power is conferred upon a corporation which is not given expressly or by clear implication.

"In view of the legislative history and practice referred to, it seems impossible to resist the conclusion, when we meet with a legislative declaration to the effect that a particular railroad shall be a public highway, that the meaning is, that it shall be open to the use of the public with their own vehicles; and that when Congress, in granting lands in aid of such a road, declared that the same shall be and remain a public highway for the use of the Government of the United States, it only means that *the Government shall have the right to use the road, but not that it shall have the right to require its transportation to be performed* by the railroad company. And when this right of the use of the road is granted 'free from all toll or other charge for transportation of any property or troops of the United States,' it only means, that the Government shall not be subject to any toll for such use of the road. This, we think, is the natural and most obvious meaning of the language used, when viewed in the light afforded by the history of railroad legislation in this country." (Emphasis added).

The same differentiation is to be found in *Hopkins v. United States,* 171 U.S. 578, 43 L. Ed. 290 and in *Anderson v. United States,* 171 U.S. 604, 43 L. Ed. 300, and is apparent from the cases now to be cited under point 6.

6. The Phrases, Interstate "Commerce", "Transportation", and "Transmission", Have Been Defined by This Court, and Other Courts, as Excluding a Commercial Enterprise of the Character of That Operated by Respondent and Its Employees.

These pertinent statements have been made by this court:—

In *Lake Superior R. R. Co. v. United States*, supra, (L. Ed. report, p. 968) it is said:—

> "The case of a turnpike • • • would have furnished no difficulty whatever. Those thoroughfares are usually constructed and owned by companies who have nothing to do with transportation thereon. They merely furnish the thoroughfare."

In *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. Ed. 953, 954, it is said:—

> "Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge."

In *Detroit International Bridge Company v. Corporation Tax Appeal Board of the State of Michigan*, 294 U. S. 83, 79 L. Ed. 777, 779, it is said:

> "The record discloses that the appellant owns, maintains and operates a bridge between Michigan and Canada across the Detroit River; that for passing over this it demands and collects tolls from vehicles and pedestrians. It 'conveys no persons or goods across the international boundary line. It merely collects tolls from such persons as use it (the bridge). It provides an instrumentality which others may use in conducting foreign commerce.'"

"After much consideration, and notwithstanding emphatic dissent, Henderson Bridge Co. v. Kentucky, 166 U. S. 150, 41 L. Ed. 953, 17 S. Ct. 532, held that a Kentucky Corporation which owned and operated a bridge over the Ohio River between that State and Indiana, and collected compensation from railroads using the structure, was not engaged in interstate commerce. By Chief Justice Fuller this Court said (p. 153):

"'The company was chartered by the state of Kentucky to build and operate a bridge, and the State could properly include the franchises it had granted in the valuation of the company's property for taxation. Central P. R. Co. v. California, 162 U. S. 91, 40 L. Ed. 903, 16 S. Ct. 766. The regulation of tolls for transportation over the bridge considered in Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. Ed. 962, 14 S. Ct. 1087, 4 Inters. Com. Rep. 649, presented an entirely different question.

"'Clearly the tax was not a tax on the interstate business carried on over or by means of the bridge, because the bridge company did not transact such business. That business was carried on by the persons and corporations which paid the bridge company tolls for the privilege of using the bridge'."

In *Chicago & N. W. R. Co. v. Bolle*, 284 U. S. 74, 76 L. Ed. 173, 176, it is said:

"It will be observed that the word used in defining the test is 'transportation,' not the word 'commerce.' The two words were not regarded as interchangeable, but as conveying different meanings. Commerce covers the whole field of which transportation is only a part; and the word of narrower signification was chosen understandingly and deliberately as the appropriate term. The business of a railroad is not to carry on commerce generally. It is engaged in the transportation of persons and things in commerce; and hence the test of whether an employee at the time of his injury is engaged in interstate commerce, within the

meaning of the act, naturally must be whether he was engaged in interstate transportation or in work so closely related to such transportation as to be practically a part of it."

Similarly we think it must be said that the word "transmission" is a word of narrower significance than the word "commerce".

The Circuit Court of Appeals for the Fifth Circuit in *Gouax v. Bovay*, 105 Fed. (2d) 256, 258, said:

> "Section 4 fully covers the matter of toll charges, which are accurately described as for the 'transit' of engines, vehicles and passengers. Section 3 relates to the charges the bridge may make for its use by railroad. Section 2 we are persuaded is not directed at all to charges made by the bridge company for 'transit', but to charges made by carriers against the United States for the 'transmission' of the mail or 'transportation' of troops and munitions across the bridge. The bridge company does not *transmit* or *transport* these, but merely permits the *transit* of them."

This Court denied certiorari in that case. Gouax v. Bovay, 308 U. S. 607, 84 L. Ed. 507.

We think it fairly apparent from the above quotations that, by judicial definition, prior to the enactment of the Fair Labor Standards Act, "commerce" was understood to exclude the operation of turnpikes and toll bridges. Of the foregoing cases only *Gouax v. Bovay* was decided after the passage of the Fair Labor Standards Act.

7. The phrases, Interstate "Commerce," "Transportation", and "Transmission", Having Been Defined Judicially to Exclude a Commercial Enterprise of the Character of that Operated by Respondent and its Employees, Those Phrases, Used Subsequently, in the Fair Labor

Standards Act, Are to be Understood in the Same Sense, and the Act is to be Understood as Excluding Such an Enterprise.

So far as counsel know, there is no more firmly fixed rule than that contained in the following quotation from *Grover & B. S. M. Co. v. Florence S. M. Co.*, 18 Wall. 553, 21 L. Ed. 914, 922:—

> ". . . the language employed . . . to describe the parties and the suit in which the alien defendant or the non-resident may remove the cause into the Circuit Court for trial, is identical with the language employed in the Judiciary Act, the two provisions differing only in the particulars heretofore sufficiently explained, showing that the well established rule applies in construing the later Act, that words and phrases, the meaning of which in a statute have been ascertained by judicial interpretation, are, when used in a subsequent statute, to be understood in the same sense. Pott. Dwarris, 274; Bac. Abr. 'Statute' I; Pennock v. Dialogue, 2 Pet., 18; Cathcart v. Robinson, 5 Pet. 280; McCool v. Smith, 1 Black, 469; Com. v. Hartnett, 3 Gray, 450; Ruckmaboye v. Mottichund, 32 Eng. L. & E., 84; Bogardus v. Trinity Church, 4 Sandf. Ch., 633; Rigg v. Wilton, 13 Ill. 15; Adams v. Fields, 21 Vt. 256. Such a construction in the case supposed becomes a part of the law, as it is presumed that the Legislature in passing the later law knew what the judicial construction was which had been given to the words of the prior enactment."

The words "commerce", "transportation" and "transmission" having been construed, prior to the passage of the Fair Labor Standards Act, to exclude turnpikes and toll-bridges, we submit that those words in that Act are to be understood as excluding turnpikes and toll bridges. If the operation of such an enterprise is not within those words, it is not worthwhile to indulge in refinement to

the extent of trying to determine whether an employee could be "engaged in commerce", even though the cases hold that his employer is not. The words "commerce", "transportation" and "transmission", exclude the operation of turnpikes and toll-bridges, whether by employer or employees.

Opposing counsel have taken the position that the authorities relied on by us merely hold that the employer in this case is not "engaged in commerce", and that the employees may be so engaged, even though the employer is not. This does not seem to be within the meaning of the language in the *Kirschbaum* case, where it is said:—

> "* * * the provisions of the Act expressly make its application dependent upon the character of the employees' activities. * * * to the extent that his employees are 'engaged in commerce or in the production of goods for commerce', the employer is himself so engaged."

What has been said in another case on the converse of that proposition by Judge Waller, the District Judge who rendered the opinion in this case below, is so forceful that we resist, with difficulty, the desire to quote him at length. In the Preamble to the Act, and in the several sub-sections thereof, which he carefully analyzes, the Judge points out and emphasizes numerous items, which lead him to the conclusion that:—

> "The words 'employer' and 'employee' are used in a concomitant relationship throughout the Act. The relationship of employer and employee is inseparable. The conclusion is inevitable that if an employee is engaged in commerce it is presupposed that his employer must also be."

Johnson v. Filstow, Inc., 43 F. Supp. 930, 931, 5 Labor Cases, Par. 61,000.

We are of the opinion that the statement, made by the Circuit Court of Appeals, which counsel for Petitioners seem to think (we believe, erroneously) indicates that that Court applies an "employer" test, was eminently correct. To us it seems a self-proving, unimpeachable verity that:—

> "If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of owning and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce."

In any event, it seems to us that the law is as stated by the Court of Appeals of Louisiana in the case of *Shannon v. Boh Bros. Construction Co.*, . . . La. App. . . ., 8 So. (2d) 542, 545, 5 Labor Cases, Par. 61,016, namely:—

> "It is said that (certain) cases are not applicable here because railway employees are considered covered by the Employers' Liability Act because of the interstate character of their employer's business, whereas under the Wage and Hour Law the employer's business is immaterial, the criterion being the occupation of the employee. It seems to us, however, that judicial interpretations of interstate commerce, no matter how provoked, are as pertinent to the consideration of the Wage and Hour Law as they would be to any other statute where the question is whether the employer or employee is employed in interstate commerce." (Bracket supplied).

In the latter case, without the benefit of *Lake Superior R. R. Co. v. United States*, *Henderson Bridge Co. v. Kentucky*, *Detroit International Bridge Company v. Corporation Tax Appeal Board* or *Gouax v. Bovay*, the Louisiana Court of Appeals arrived at the conclusion that one engaged in repairing a city street in the City of New Orleans, over which vehicles engaged in interstate commerce passed, was

not himself "engaged in commerce" and was not within the coverage of the Fair Labor Standards Act.

8. Discussion of the Authorities Relied on by Petitioner.

Counsel seem to rely upon *Pedersen v. D. L. & W. R. Co.*, 229 U. S. 146 and *P. B. & W. R. Co. v. Smith*, 250 U. S. 101. We think they can get scant comfort from those cases. It will clearly appear from the following quotation that the matter under investigation in those cases was the closeness of the connection of the work of the employee with the interstate commerce in which his employer was engaged. Only by virtue of the employer's engagement in commerce did this court decide that the employee could be so engaged. Here the employer is not engaged in commerce at all. There:—

> "That the defendant was engaged in interstate commerce is conceded; and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars; and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition, and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct 'any defect or insufficiency * * * in its cars, engines, appliances, ma-

chinery, track, roadbed, works, boats, wharves, or other equipment' used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. *The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged?* See McCall v. California, 136 U. S. 104, 109, 111, 34 L. Ed. 391, 392, 393, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; Second Employers' Liability Cases (Mondou v. New York, N. H. & H. R. Co.) 223 U. S. 6, 59, 56 L. Ed. 329, 350, 38 L. R. A. (N.S.) 44, 32 Sup. Ct. Rep. 169; Zikos v. Oregon R. & Nav. Co. 179 Fed. 893, 897, 898; Central R. Co. v. Colasurdo, 113 C. C. A. 379, 192 Fed. 901; Darr v. Baltimore & O. R. Co. 197 Fed. 665; Northern P. R. Co. v. Maerkl, 117 C. C. A. 237, 198 Fed. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines, or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such." (Emphasis added.)

Pedersen v. Delaware, Lackawanna & Western Railroad Company, 229 U. S. 146, 57 L. Ed. 1125.

This decision is correctly analyzed, we believe, by the Appellate Division, 3rd Department, New York Supreme Court, in *Pedersen v. J. F. Fitzgerald Construction Co.* 262 App. Div. 665, 30 N. Y. S. (2d) 989', 5 Labor Cases, par.

'This case is referred to in a footnote in the Kirschbaum case in this Court.

60,788, affirming 173 Misc. 188, 18 N. Y. S. (2d) 920, 2 Labor Cases, 481, where it is said:

> "While the railroad company was obviously engaged in interstate commerce, the defendant was an independent contractor employed by the railroad to perform work clearly local in its character and separate and distinct from such commerce. (Browning v. Waycross, 233 U. S. 16, 22). Plaintiffs were at no time employed by the railroad company. We have no such situation as found in Pederson v. Delaware, Lackawanna & Western R. R., 229 U. S. 146, for there the work was being prosecuted by a railroad engaged in interstate commerce and the work was so clearly connected with it as to be a part thereof. Here, the defendant was not engaged in interstate commerce and was simply performing local construction work which was neither an interstate occupation nor commerce. (General Railway Signal Co. v. Virginia ex rel. Corporation Commission, 246 U. S. 500). Interstate commerce means interstate commercial intercourse, and while defendant pursuant to its contract was engaged in work upon an instrumentality of interstate commerce, the performance of such work does not constitute such commerce. (McKee v. Ohio Electric Railway Co., West Virginia Supreme Court of Appeals, 88 S. E. 616)."

In *Chicago & N. W. Ry. Co. v. Bolle*, supra, it was held that an employee, receiving an injury while engaged in work not incidental to transportation in commerce, but purely incidental to the furnishing of steam for heating the station and other structures of the Railroad Company, his duties being confined to the production of a supply of steam for that purpose, which steam was not to be used directly or indirectly in the transportation of anything, was not "engaged in commerce" within the meaning of the Employer's Liability Act.

In this latter decision the court reviewed the cases, including *Pedersen v. Delaware, Lackawanna & Western Railroad Co.*, supra, and seems materially to constrict earlier decisions. Although the case does not cite *P. B. & W. R. Co. v. Smith*, supra, it seems, effectively, to overrule it. The true test, for determining whether there was "employment in commerce", firmly established by the *Bolle* and *Shanks* (*Shanks v. Delaware, L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436) cases is, was the employee at the time of the injury engaged in the interstate transportation carried on by his employer or in work so closely related to it as to be practically a part of it.

In the light of the *Bolle* case, we do not believe that *P. B. & W. R. Co. v. Smith* is good law, but, in any event, there the *employer* was in "commerce," and the employees' duties were considered as an integral part thereof, and the test in *Pedersen v. Delaware, L. & W. R. Co.* was applied. That test can have no application here.

In *Alkocus v. Terker*, unreported, so far as we know, cited by counsel for Petitioners, the court did not have the advantage of the cases herein cited, and seems to have been more concerned with the power which Congress has under the Commerce clause, rather than with the question whether, in the situation before that court, Congress had seen fit to exercise its power. We believe that that court, (which is inferior to the court which handed down the *Pedersen v. J. F. Fitzgerald Co.* decision), missed the whole crux of the problem. We admit that that decision is contrary to the position which we take. We doubt its persuasive force, as well as its correctness.

We cannot see that the other decisions cited have any application to our situation.

9. Conclusion.

We conclude, and respectfully submit, that none of the Petitioners have brought their cases within the protection of the Fair Labor Standards Act, by establishing that they were "engaged in commerce" within the meaning of that Act, and that their cases must fail.

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